Supreme Court, U. S.
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No. 80-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SOLO CUP COMPANY,

Respondent,

vs.

FEDERAL INSURANCE COMPANY,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Seventh Circuit's the interpretation of an insurance policy under Illinois law, which admittedly applies to this case, erroneously found the insurer liable.

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Respondent, Solo Cup Company, respectfully opposes issuance of a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered April 11, 1980, reported at 619 F.2d. 1178 (7th Cir., 1980). A., pp. 1a-17a.[1]

[1] References to pages of the Appendix to the Petition for Writ of Certiorari are referred to in the form "A.____"

SUMMARY OF ARGUMENT

This case does not present any of the grounds for review set forth in Rule 17 of the Rules of this Court. The sole issue presented here involves the interpretation of an insurance policy under Illinois law. The Seventh Circuit's opinion conflicts with no decision by the Illinois Supreme Court nor any decision by any other Circuit. Furthermore, the decision below does not conflict with any decision by this Court and presents no question warranting review.

REASONS FOR DENYING THE WRIT

1. The primary contention of the Petition is that the court below "impermissibly conferred" upon Respondent an "advantage denied a plaintiff in the Courts of Illinois". Pet. Cert., pp. 5-8. The Court of Appeals, however, expressly applied Illinois law in this case and based upon its interpretation of Illinois authority, concluded that "under Illinois law, Federal [the Petitioner] has breached its duty to defend its insured in the action." A., pp. 9a, 13a.

The Petitioner seeks, therefore, only to contest whether the Court of Appeals, admittedly applying the correct law, reached the correct conclusion. This is not an issue warranting review. Indeed, the Petition refers to no contrary decision by the Illinois Supreme Court whereas the court below followed two established Illinois Supreme Court cases: *Maryland Casualty Company* v. *Peppers,* 64 Ill.2d 187, 355 N.E.2d 24 (1976), and *Pioneer Insurance Company* v. *Alliance Insurance Company,* 374 Ill. 576, 586, 30 N.E.2d 66, 71-72 (1940), A., p. 5a. Clearly, the decision of the Court of Appeals does not "violate the command of this Court in *Erie* [v. *Tompkins,* 304 U.S. 64 (1937)]". Pet. Cert., p. 8.

2. Petitioner also mistakingly asserts that the decision below is contrary to decisions of this Court because the lower

court "ruled necessarily though not expressly that the consequences or effects of discrimination in a disparate impact case are 'unintentional' . . ." Pet. Cert., pp. 8-10. The court below did not so rule and did not have to so rule to hold for Respondent. The Seventh Circuit interpreted only the Petitioner's insurance policy not Title VII.[2] Whether the Respondent's acts were intentional or unintentional may be relevant under Title VII; but not under that insurance policy which required for coverage only that the results, and not the acts, be unintentional.[3]

The court below did find that "since disparate impact liability [under Title VII] does not require proof of discriminatory *motive*, and since [Petitioner] Federal has, moreover, conceded that the policy covers at the least some types of disparate impact claims, we therefore hold that the disparate impact claim which could have been proven under the allegations of the underlying complaint was a claim potentially within the coverage of the policy." A., p. 13a (emphasis added; footnote omitted). Such a finding is not inconsistent with the decisions of this Court, none of which has ever required a finding of discriminatory *motive* for a Title VII violation.[4]

To the contrary, this Court has consistently held that if disparate impact is found, liability for discrimination under

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[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 20003, *et seq.;* herein referred to as "Title VII".

[3] Relevant excerpts from the insurance contract are as follows:

"Personal injuries" is defined to include "Discrimination". "Occurrence", which is a covered event, is defined as " . . . an event or a repeated exposure to conditions which unexpectedly and *unintentionally results in personal injury*". (emphasis supplied).

[4] As decided by this Court, "disparate impact" cases analyze the validity of employment practices which are facially neutral in form but discriminatory in operation. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977).

Title VII does not require any finding of intent. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430, for example, this Court held:

> "Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained . . ."

And, further stated,

> "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms . . ."

Id. at 432. The court below did not deviate from this principle and surely did not, in resolving only the applicability of a particular insurance policy, "radically . . . amend Title VII." Pet. Cert., p. 10.

3. Permitting insurance against losses arising from discrimination does not encourage discrimination any more than fire insurance can be said to encourage fires or automobile insurance to encourage accidents. Rather, such a policy provides a fund to alleviate the effects of proven discrimination when an employee might otherwise be economically unable to do so.[5]

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[5] The Seventh Circuit found insurance for "disparate impact" cases under Title VII would further, not deter, the policies of Title VII:

> [T]he fact of insurance may be helpful toward achieving the desirable goal of voluntary compliance . . . [C]omplex analyses of employment standards, while apparently necessary in order to ensure that an employer's policies do not needlessly place a stumbling block in the way of women or minorities, may well become, as a practical matter, beyond the financial capabilities of all but the largest employers. The involvement of insurance in the field might, however, ease the burden on smaller employers by making claim prevention services available on a cost effective basis to help employers evaluate their employment standards. Workmen's compensation insurers have, by way of analogy, no doubt helped prevent numerous employee injuries, and it is not undesirable, nor inconceivable, that discrimination insurers might aid in preventing the injury of discrimination as well.

A., pp. 14a-15a.

No public policy, Illinois or Federal, prohibits insurance against intended acts which unintentionally cause injury such as Title VII "disparate impact" cases.[6] The general public policy prohibiting contracts which could extend coverage to the knowledgeable or criminal wrongdoer is not applicable here.[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[6] See, e.g., *Union Camp Corp.* v. *Continental Casualty Co.*, 452 F.Supp. 565 (S.D. Ga. 1978), which in accord with the decision below, held that providing insurance coverage for Title VII liability is not contrary to public policy.

[7] *Hartford Life Insurance Co.* v. *Title Guarantee Co.*, 520 F.2d. 1170 (D.C. Cir. 1975); COUCH ON INSURANCE, 2d § 136 (Supp., 1979).